

Nº. 46314-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CITY OF TACOMA
Respondent,

v.

KENNETH DRISCOLL,
Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 13-1-03277-7
The Honorable Katherine Stolz, Reviewing Judge

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I. REPLY

ER 404 is an exclusionary rule precluding the use of evidence of a person's character to prove that he or she acted in conformity with his or her character on a particular occasion.¹ The rule provides in pertinent part:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

....

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused...”.

ER 404(a)(2).

ER 405 sets forth the methods by which character may be proved. It provides:

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

¹ ER 404(a); *State v. Bell*, 60 Wn.App. 561, 564, 60 Wn.App. 561, 805 P.2d 815, review denied, 116 Wn.2d 1030, 813 P.2d 582 (1991); *State v. Alexander*, 52 Wn.App. 897, 900, 765 P.2d 321 (1988).

ER 405.

When a defendant asserts a theory of self-defense, the victim's violent character may be relevant for purposes of determining: (1) whether the victim was the initial aggressor; or (2) whether the defendant had a reasonable apprehension of danger.² In the former case (whether the victim was the initial aggressor), evidence of the victim's character is admitted to show that the victim acted in conformity with his or her character on a particular occasion; that is, that the victim, possessing a violent character, was likely to have been the initiator of the incident.³ Under these circumstances, evidence of the victim's character is subject to the restrictions set forth in Rules 404 and 405.⁴

In contrast, in the latter case (whether the accused had a reasonable apprehension of danger), evidence of the victim's character is admitted to show the defendant's state of mind; that is, the reasonableness of his or her belief that the use of force was necessary in self-defense.⁵ Under these circumstances, because the character evidence is used for a purpose other than to show that the victim acted

² *Alexander*, 52 Wn.App. at 900, 765 P.2d 321.

³ *See United States v. Keiser*, 57 F.3d 847, 853–54 (9th Cir.), *cert. denied*, 116 S.Ct. 676 (1995).

⁴ *See, e.g., Alexander*, 52 Wn.App. at 900–01.

⁵ *State v. Dyson*, 90 Wn.App. 433, 438–39, 952 P.2d 1097 (1997) (“To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable.”).

in conformity therewith, the restrictions of Rules 404 and 405 do not apply.⁶ Evidence of specific acts is admissible provided the defendant was aware of the acts at the time.⁷

1. The City fails to address why the evidence of the prior attacks was inadmissible for purposes of demonstrating Mr. Driscoll's state of mind as part of his defense of self-defense.

The City argues that the trial court did not abuse its discretion in excluding the prior attacks by Ms. Miles against Mr. Driscoll because Mr. Driscoll did not prove the existence of the prior attacks by a preponderance of the evidence, making evidence of the attacks inadmissible under ER 401, ER 402, ER 404(b), and ER 405.⁸

Mr. Driscoll specifically asserted that he sought to introduce evidence of Ms. Miles' prior attacks against him for purposes of proving his state of mind as part of his defense of self-defense.⁹ The City ignores that where a defendant asserts that he acted self-defense, evidence of prior attacks by the victim against the defendant offered to

⁶ See *Keiser*, 57 F.3d at 853 (citing *State v. Bland*, 337 N.W.2d 378, 382 (Minn.1983); *State v. Duncan*, 111 N.M. 354, 805 P.2d 621, 623 (N.M.1991), cert. denied, 973 P.2d 270 (1994)); 5C Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* at 203 (1997).

⁷ *State v. Walker*, 13 Wn.App. 545, 549–50, 536 P.2d 657 (1975).

⁸ City's Response Brief, p. 9-13.

⁹ CP 99.

prove the defendant's state of mind is admissible and ER 404 and ER 405 do not apply.¹⁰

The City also does not address the numerous Washington Court of Appeals and Supreme Court cases holding that where a defendant asserts that he acted in self-defense against an individual who had assaulted the defendant previously, the jury must be informed of all facts of prior attacks known to the defendant at the time the defendant acted in self-defense so that the jury may judge the defendant's state of mind and reasonableness of the defendant's actions.¹¹

2. Evidence of Ms. Miles' prior attacks was not inadmissible under ER 401, ER 402, ER 404, and ER 405.

The City further fails to address why the trial court's findings of fact support the exclusion of evidence of the prior attacks by Ms. Miles against Mr. Driscoll where the evidence was offered to prove Mr. Driscoll's state of mind and the reasonableness of his actions.

Given that both the Court of Appeals and the Supreme Court have repeatedly held that prior attacks by a victim against a defendant

¹⁰ See *Keiser*, 57 F.3d at 853.

¹¹ See *State v. Cloud*, 7 Wn.App. 211, 218, 498 P.2d 907 (1972); *State v. Adamo*, 120 Wn. 268, 269, 207 P. 7 (1922); *State v. Woodard*, 26 Wn.App. 735, 737, 617 P.2d 1039 (1980); *State v. Walker*, 13 Wn.App. 545, 549–50, 536 P.2d 657 (1975); *State v. Wanrow*, 88 Wn.2d 221, 234, 235, 240, 559 P.2d 548 (1977); *State v. Kelly*, 102 Wn.2d 188, 196–97, 685 P.2d 564 (1984); *State v. Allery*, 101 Wn.2d 591, 594–95, 682 P.2d 312 (1984); *State v. Ellis*, 30 Wn. 369, 373, 70 P. 963 (1902); *State v.*

where the defendant asserts self-defense is admissible to prove the defendant's state of mind and the reasonableness of his actions, the trial court abused its discretion in excluding the prior attacks by Ms. Miles by finding the evidence was irrelevant under ER 401 and ER 402.

ER 404(a)(2) permits a defendant to introduce evidence of the character of a "victim" for purposes of establishing that the "victim" as the first aggressor. ER 405(b) permits proof of character by specific instances of conduct where the character of the person is an essential element of a defense.

A "first aggressor" instruction was given to the jury.¹² The jury was instructed that if the jury found that Mr. Driscoll was the first aggressor, the defense of self-defense was not available to him. Mr. Driscoll testified that Ms. Miles attacked him first.¹³ There was no other evidence presented about how the altercation between Ms. Miles and Mr. Driscoll began. The giving of the first aggressor jury instruction combined with Mr. Driscoll's testimony that Ms. Miles was the first aggressor rendered specific instances of Ms. Miles' conduct an essential element of Mr. Driscoll's defense of self-defense. Evidence of Ms. Miles' prior assaults was admissible under ER 404(a)(2) and ER

Crigler, 23 Wn.App. 716, 719, 598 P.2d 739, 741 (1979); *State v. Bailey*, 22 Wn.App. 646, 649, 591 P.2d 1212, 1214 (1979).

¹² CP 263.

405(b) to permit the jury to determine whether or not Ms. Miles was the first aggressor in this situation and to weigh the reasonableness of Mr. Driscoll's response to Ms. Miles' attack.

3. Exclusion of the evidence of two of the three prior attacks violated Mr. Driscoll's Constitutional right to present his defense.

Mr. Driscoll's knowledge of Ms. Miles' prior attacks upon him was relevant in this case both for purposes of assisting the jury in deciding if Mr. Driscoll was the first aggressor and in determining if the force used by Mr. Driscoll to defend himself was reasonable. Exclusion of the two additional prior attacks by Ms. Miles was therefore doubly prejudicial since Mr. Driscoll was prevented introducing relevant and highly probative evidence directly related to bother whether he could assert self-defense and whether the force he used was reasonable under the circumstances.

As stated in Mr. Driscoll's Opening Brief, exclusion of the evidence that Ms. Miles had attacked Mr. Driscoll on two occasions prior to the immediate incident and both times had used a deadly weapon in the attacks greatly weakened Mr. Driscoll's defense. Not only was the jury supposed to make its determination based on all facts known to Mr. Driscoll, but the jury would have determined whether

¹³ CP 221-222.

Mr. Driscoll was the first aggressor and weighed the reasonableness of Mr. Driscoll's actions differently if it was aware of three prior attacks rather than only one prior attack by Ms. Miles.

Mr. Driscoll's violent response to Ms. Miles in the instant case appears far less reasonable if one is only aware of a single prior attack by Ms. Miles against Mr. Driscoll. A man using the amount of force Mr. Driscoll used appears much more reasonable when considered in light of the fact that the person against whom he used force had attacked him three times previously, each time with a deadly weapon. Mr. Driscoll's claim of self-defense was much less credible without the evidence that Ms. Miles had previously attacked him with a meat cleaver and a rock, both of which were items Ms. Miles could have secreted on her person.

The exclusion of evidence of two prior attacks by Ms. Miles was an abuse of discretion that denied Mr. Driscoll his ability to present a defense.

II. CONCLUSION

For the reasons stated above and in Mr. Driscoll's Opening Brief, the exclusion of the evidence of the two prior attacks by Ms. Miles upon Mr. Driscoll was an abused of discretion that deprived Mr. Driscoll of the ability to present a defense. This Court should vacate

Mr. Driscoll's conviction and remand this case for retrial where evidence of all prior attacks by Ms. Miles is admitted.

DATED this 5th day of May, 2015.

Respectfully submitted.



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Attorney for Appellant Driscoll

I hereby certify, under penalty of perjury under the laws of the state Washington that on May 5, 2015, I mailed via first class US mail, postage prepaid a true and correct copy of the Appellant's Reply Brief addressed to:

Mr. Kenneth Driscoll,
425 South Tacoma Way
Tacoma, WA 98402

and I delivered via legal messenger a true and correct copy of the Appellant's Reply Brief to:

City of Tacoma Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

DATED: May 5, 2015.

Respectfully Submitted.

By 

Reed Speir, WSBA No. 36270

SPEIR LAW OFFICE

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